Combat Enterprise (M) Sdn Bhd v Lucksoon Metal Works Sdn Bhd

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–825 OF 2006
TENGKU BAHARUDIN SHAH, ABU SAMAH AND T SELVENTHIRANATHAN JJCA
27 DECEMBER 2011

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Contract — Goods sold and delivered — Claim for payment — Claim for payment of balance of purchase price — Counterclaim for rectification costs — Trial judge dismissed claim for payment because goods not fit for purpose — Counterclaim allowed — Appeal against decision — Whether trial judge erred in law and fact in allowing counterclaim as damages for breach of contract — Whether respondent's actions unreasonable

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The appellant and respondent entered into a sale and purchase agreement wherein the appellant agreed to construct, design, and deliver to the respondent a set of equipment known as the paint line system ('PLS'). The total purchase price of the PLS was agreed at RM1,120,000. Although there were numerous discussions in respect of the technical design and construction of the PLS in order to meet the respondent's requirements and the purpose for which the PLS was purchased, the PLS that was delivered to the respondent on 7 August 1992 did not meet the respondent's requirements. Due to the various defects in the PLS, the respondent refused to accept the commissioning of the PLS. However, throughout the dispute between the parties as to the defects in the PLS, most of which arose from the inability of the PLS to carry materials of a certain weight (the weight issue), the respondent did enjoy the usage of the PLS and managed to fulfill its contractual obligations with third parties. Sometime towards the end of the two year warranty period on the PLS, the respondent appointed another company ('CISB') to supply, modify and install a new PLS with different specifications, design and quality at the cost of RM1,365,000. The appellant filed an action against the respondent for the balance of the purchase price of the PLS, ie the RM448,000 or 40% of the purchase price that was retained by the respondent as security for due performance of the agreement to deliver the PLS, and another sum of RM44,050 in respect of some other goods supplied by the appellant to the respondent. The respondent counterclaimed for damages in the sum of RM1,365,000, which was the sum it had incurred in appointing CISB to rectify the appellant's PLS. The trial judge found that the PLS sold and delivered to the respondent was not fit for its purpose due to the 'weight issue'. Accordingly the trial judge dismissed the appellant's claim for the balance of the purchase price but allowed the respondent's counterclaim in the sum of

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RM1,365,000 as damages for breach of contract after deducting the sum of RM448,000 retained by the respondent. This was the appellant's appeal against that decision.

Held, allowing the appellant's appeal on the counterclaim but dismissing the appeal on the claim for the balance of the purchase price:

(1) The trial judge had erred in law and fact in allowing the respondent's counterclaim of RM1,365,000 as damages for breach of contract. The installation of a new or substantially new system with different design specifications and quality and the giving of a fresh warranty was obviously not rectification of defective parts in the appellant's PLS (see para 12).

(2) Although the respondent had the option to terminate the agreement with the appellant for alleged breach of the implied term that the PLS was not fit for its purpose, it opted to continue its business by using the PLS supplied by the appellant with its numerous shortcomings. As such, it could not be said that the appellant's PLS was not performing and totally inoperative throughout the warranty period before the respondent's decision to change to another system supplied by CISB (see para 13).

(3) The respondent's refusal to commission the PLS was unreasonable and unjustified on the facts and in the circumstances of the case. The trial judge had misdirected himself in fact and in law by agreeing that the PLS could not be commissioned when there was credible evidence that showed that the respondent had by his own actions unreasonably refused to commission the appellant's PLS. Thus the judgment sum of RM872,850 awarded in favour of the respondent ought to be set aside (see para 16).

(4) However, the respondent was entitled to the retention sum of RM448,000 held as security for due performance of the appellant's obligations in view of the numerous defects in the PLS, which had put the respondent to a great expense and considerable inconvenience (see para 17).

[Bahasa Malaysia summary

Perayu dan responden memeterai suatu perjanjian jual beli di mana perayu telah bersetuju untuk membina, mereka bentuk, dan menyerahkan kepada responden satu set peralatan yang dikenali sebagai *paint line system* ('PLS'). Jumlah harga belian PLS telah dipersetujui pada RM1,120,000. Walaupun terdapat banyak perbincangan berkenaan reka bentuk teknikal dan pembinaan PLS bagi memenuhi keperluan responden dan objektif PLS dibeli, PLS yang telah dihantar kepada responden pada 7 Ogos 1992 tidak memenuhi keperluan responden. Disebabkan pelbagai kecacatan pada PLS, responden enggan untuk mengkomisenkan PLS. Walau bagaimanapun, sepanjang

pertikaian antara pihak-pihak berkenaan kecacatan dalam PLS, yang sebahagian besarnya timbul daripada ketidakupayaan PLS untuk membawa bahan-bahan berat tertentu ('isu berat'), responden tetap menikmati penggunaan PLS tersebut dan berjaya memenuhi obligasi kontrak dengan pihak ketiga. Menjelang akhir tempoh dua tahun jaminan PLS, responden telah melantik syarikat lain ('CISB') untuk membekalkan, mengubah dan memasang PLS baru dengan spesifikasi, reka bentuk dan kualiti yang berbeza, pada kos RM1,365,000. Perayu memfailkan tindakan terhadap responden bagi baki harga pembelian PLS, iaitu RM448,000 atau 40% daripada harga belian yang disimpan oleh responden sebagai jaminan untuk pelaksanaan perjanjian untuk menyampaikan PLS, dan sejumlah lagi sebanyak RM44,050 bagi beberapa barang-barang lain yang dibekalkan oleh perayu kepada responden. Responden menuntut balas untuk ganti rugi berjumlah sebanyak RM1,365,000, yang merupakan jumlah wang yang telah dibelanjakan dalam pelantikan CISB untuk membetulkan PLS perayu. Hakim bicara mendapati bahawa PLS yang dijual dan dihantar kepada responden tidak sesuai untuk tujuannya atas 'isu berat'. Dengan itu, hakim bicara menolak tuntutan perayu untuk baki harga belian tetapi membenarkan tuntutan balas responden berjumlah sebanyak RM1,365,000 sebagai ganti rugi pelanggaran kontrak selepas menolak jumlah RM448,000 yang ditahan oleh responden. Ini adalah rayuan perayu terhadap keputusan tersebut.

Diputuskan, membenarkan rayuan perayu bagi tuntutan balas tetapi menolak rayuan tuntutan bagi baki harga belian:

(1) Hakim bicara telah terkhilaf dalam undang-undang dan fakta dalam membenarkan tuntutan balas responden sebanyak RM1,365,000 sebagai ganti rugi bagi pelanggaran kontrak. Pemasangan sistem baru atau pada asasnya baru dengan spesifikasi reka bentuk dan kualiti yang berbeza dan pemberian jaminan baru adalah jelas bukan pembetulan bahagian yang rosak pada PLS perayu (lihat perenggan 12).

(2) Walaupun responden mempunyai pilihan untuk menamatkan perjanjian dengan perayu kerana melanggar terma tersirat bahawa PLS tidak sesuai untuk tujuannya, ia memilih untuk meneruskan perniagaan dengan menggunakan PLS yang dibekalkan oleh perayu dengan pelbagai kelemahan. Oleh itu, ia tidak boleh dikatakan bahawa PLS perayu telah tidak melaksanakan dan benar-benar tidak beroperasi sepanjang tempoh jaminan sebelum keputusan responden untuk menukar kepada sistem lain yang dibekalkan oleh CISB (lihat perenggan 13).

(3) Keengganan responden untuk mengkomisenkan PLS adalah tidak munasabah dan tidak wajar pada fakta dan hal keadaan kes itu. Hakim perbicaraan telah salah arah dirinya dalam fakta dan undang-undang dengan bersetuju bahawa PLS tidak boleh dikomisenkan apabila terdapat bukti yang boleh dipercayai yang menunjukkan bahawa

responden telah, dengan tindakannya sendiri, secara tidak munasabahnya, enggan mengkomisenkan PLS perayu. Oleh itu, jumlah penghakiman sebanyak RM872,850 yang diberikan memihak kepada responden wajar diketepikan (lihat perenggan 16).

(4) Walau bagaimanapun, responden berhak kepada jumlah tahanan sebanyak RM448,000 yang dipegang sebagai cagaran bagi pelaksanaan kewajipan perayu melihat pada pelbagai kecacatan dalam PLS, yang telah menyebabkan suatu perbelanjaan besar dan kesulitan terhadap responden (lihat perenggan 17).]

Notes

For cases on claim for payment, see 3(3) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 4539–4542.

Appeal from: Civil Suit No D2–22–1447 of 1993 (High Court, Kuala Lumpur)

Chan Kah Meng (Veronica Ong with him) (Lim Kian Leong & Co) for the appellant.
S Sivaneindiren (Pang Kong Leng with him) (Cheah Teh & Su) for the respondent.

Abu Samah JCA:

[1] This is the majority judgment of the court. We have before us an appeal by the appellant against the decision of the learned trial judge who dismissed the appellant's action against the respondent for the balance of the purchase price of a set of equipment, known as 'paint line system' ('PLS') in the sum of RM448,000 and allowed the respondent's counterclaim for damages in the sum of RM1,365,000. The final sum due on the counterclaim after deducting a sum of RM448,000 retained by the respondent as security for due performance of the appellant's obligations under the supplementary sale and purchase agreement and another sum of RM44,050 in respect of some other goods supplied by the appellant, was RM872,950. The learned judge also awarded interest on the sum of RM872,950 and costs.

[2] After hearing the parties, this court, by majority dismissed the appellant's appeal in respect of the claim for the balance purchase price but allowed in part the appellant's appeal in respect of the judgment on the counterclaim. We ordered that each party should bear its own costs. Our learned brother, T Selventhiranathan JCA, however had a different view. His Lordship dismissed the appellant's appeal with costs and affirmed the trial judge's decision.

[3] The background facts had been sufficiently set out in the trial judge's judgment and will not be rehearsed except where necessary. Prior to the

purchase of the PLS, both sides had held numerous discussions in respect of the technical design, construction and specification of the PLS in order to meet the respondent's requirements and the purpose for which said PLS was purchased.

[4] It is the respondent's pleaded case that the material to be painted by the use of the PLS was aluminium extrusions and panels; the PLS should have the capacity to paint surfaces which are 20ft in length and 5ft in height and that it should have the ability to paint both sides; and that the PLS would initially and principally be used to provide aluminium sunscreen and louvers, aluminium and glaring works (curtain walls) to the Capital Square Project (para 10(h), of counterclaim). There was however no discussion on specific requirement that the conveyor of the PLS should be able to carry materials of a certain minimum weight, for example, 65kg or 200kg. We make this observation at the outset as the learned judge held the appellant liable on the counterclaim primarily on the ground that the PLS sold and delivered to the respondent was not fit for its purpose due to the failure to design the system which would be able to carry materials of a certain minimum weight. The learned judge agreed with the respondent's contention that it relied on the appellant's expertise to construct, design and deliver PLS that meets the respondent's requirements and fit for its purpose. The learned judge found as a fact that 'at the root of the dispute in this case is the weight issue'. This was also the crux of Mr Sivaneindiren's submission, learned counsel for the respondent, that most of the defects in the PLS arose from the weight problem. The respondent conceded that the 'weight issue' was not raised at the negotiation stage. It now alleged that it relied on the appellant's own expertise. It is apparent to us that the respondent's persistent refusal to accept the commissioning of the PLS was not due to the various other defects in the PLS, which defects had been attended to by the appellant although not necessarily to the satisfaction of the respondent.

[5] The total purchase price of the PLS was RM1,120,000. Vide agreement by way of letter dated 9 March 1992. It was delivered to the respondent on 7 August 1992: see Delivery Order No 15940 dated 7 August 1992. But due to several defects in the system the appellant was not able to commission the PLS by 31 August 1992 as is specified in the novation agreement dated 28 April 1992 or by the extended date of 23 September 1992.

[6] By a supplementary agreement dated 21 January 1993 the respondent agreed to extend the date of commission to another three months from the date thereof failing which the respondent would commission the PLS by itself or through others. As it turned out, the PLS was never commissioned due to parties dispute on the defects in the system. It was not however denied that throughout the dispute, the respondent did enjoy the usage of the PLS and managed to fulfil its contractual obligations with third parties. In fact, in its letter to the appellant dated 23 July 1993, the respondent admitted that a few

projects had been completed, despite of the respondent being unable to run productions at expected capacity due to under designed conveyor.

[7] It was towards the end of the two year warranty period that the respondent appointed another company to supply, modify and install a new PLS with different specifications, design and quality. That company was Control Instruments (M) Sdn Bhd ('CISB'). DW3, the managing director of the respondent admitted in his testimony that the Capital Square project for which the PLS was principally meant for was completed prior to the signing of the agreement with CISB on 31 March 1994. The agreement with CISB to supply, modify, install and commission another PLS was at the costs of RM1,365,000, a sum which exceeded the purchase price of PLS designed and sold by the appellant. There was a dispute as to whether the agreement with CISB was for rectification of the PLS sold by the appellant or for a new PLS to replace the existing PLS. So, what exactly was the contract between the respondent and Control Instruments (M) Sdn Bhd? Lim Boon Teng ('DW5'), the coatings manager of the respondent stated in his witness statement that the agreement was:

> To supply, modify, install and commission the Paint Line System for aluminium extrusions for the contract sum of RM1,365,000.

[8] DW5, in cross-examination denied that the agreement with CISB was for a new paint line. But this is what he said in answer to further cross-examination on CISB's scope of works:

> Q: It involved replacement of 17 new pieces of equipment and systems. Numbers 1(a), 1(b), 1(c), 1(d), 1(e), 1(f), 2, 3, 4, 5, (6-a separate quotation), 7. There are 8 items under (3).
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> A: Those items were new replacements.
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> Q: So, effectively it was a new line.
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> A: Yes.

The PLS that was supplied and installed by CISB was commissioned in July 1994, almost two years after the delivery of appellant's PLS. It must be noted that the warranty period of the appellant's PLS was only for two years. The various correspondences between the appellant and the respondent showed that the latter would charge the former for rectification of PLS undertaken by third parties, but there was no counterclaim on these charges.

[9] By letter dated 7 May 1993 the respondent threatened to terminate the agreement with the appellant and to take legal action if the defective works, including the overhead conveyer system, were not rectified by 5 June 1993. The respondent did not however terminate the agreement for alleged breach of

implied term in that the PLS was not fit for its purpose or for the numerous defects in the system. Instead, it continued operating the PLS and benefitted from it. The respondent opted to sue the appellant for damages for breach of contract and claimed the replacement costs rather than rescinding the contract. The respondent treated the costs as the damages it had suffered occasioned by the defects in the appellant's system.

[10] DW6, the managing director of CISB in his cross-examination admitted that the PLS it supplied to the respondent was of different specifications and quality. The conveyors and pumps were also different. As to whether its system was effectively a new line or not, this is what he said:

> Q: DW5 conceded what you provided was effectively a new line. Do you agree?
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> A: Not 100% a new line.

[11] It is the respondent's pleaded case that the sum of RM1,365,000 it is counterclaiming is for the cost of rectification of the appellant's PLS but what came out of the evidence at the trial was different. The learned judge in his judgment made a finding of fact that the contract between the respondent and CISB was, to quote the contract between the respondent and CISB was, to quote the learned judge, 'actually it involved the replacement of substantial parts of the line' as CISB was unwilling the give a warranty unless defective parts were replaced. At p 14 of his judgment (p 32 of the appeal records) the learned judge held that the new line was 'Virtually the C.I Line'.

[12] DW3, in examination-in-chief admitted: 'Under the contract Control Instruments was substantially changing the paint line system. It was necessary because we needed the warranty. They were not willing to give a warranty on Combat parts. So we needed to substantially change the paint line.' Yet the court allowed the cost of RM1,365,000 as if it was the damages due to defective works. We note that this happened towards the end of the warranty period of the line system supplied by the appellant. In our judgment it would be wholly unjustifiable to allow the cost of supplying, modifying and installing a substantially new line with different specifications and quality as damages for rectification of defects in the appellant's PLS. The amount of counterclaim awarded to the respondent was far in excess of the agreed amount of RM448,000 (40% of the purchase price) held by the respondent as retention sum for the due performance of the appellant's obligations. In our judgment, the learned trial judge erred in law and fact in allowing the respondent's counterclaim in the sum of RM1,365,000 as damages for breach of contract. Installation of a new or substantially new system with a different design, specifications and quality and the giving of a fresh warranty was obviously not

rectification of defective parts in the appellant's paint line system.

REFUSAL TO COMMISSION

[13] The term 'commission' is defined in the supplementary agreement to mean, 'the equipment installed and working in accordance to the specification in the Agreement to the satisfaction of Lucksoon'. There was no dispute that the equipment or the PLS sold and delivered to the respondent was in accordance with the specification. It was also an undeniable fact that the respondent had usage of the PLS and profitted from it before it changed to another system with a different design and quality in July 1994. The respondent had the option to terminate the agreement with the appellant for alleged breach of an implied term ie that the PLS was not fit for its purpose but it opted to continue its business by using the system supplied by the appellant despite of its numerous shortcomings. It could not be said that the appellant's PLS was not performing and totally inoperative throughout the warranty period before changing it to another system supplied by CISB.

[14] The word 'commission' is defined in *Concise Oxford Dictionary* (9th Ed), as among others:

> 4. Bring (a machine, equipment, etc) into operation.

DW6, when cross-examined on what he meant by commission, testified (p 640 AR):

> First one test and adjust each individual equipment and then we run the whole line. We consider that as commissioning. I think it should include trial production …
>
> Q: Would you consider the line commissioned if after all the client run several million ringgit worth of products through the line over a period of more than a year?
>
> A: Yes.
>
> Q: Would you consider it unreasonable on the part of a client In that position to insist that the line is not commissioned?
>
> A: Yes.

[15] DW3 admitted in cross-examination that throughout the usage of the appellant's PLS, the respondent has several contracts (exh P14) worth around RM67,000,000 (pp 471–474 AR). He further admitted that the respondent used 'Combat's paint line' for the said jobs.

[16] DW4, the respondent's expert witness conceded that, 'if you took this factors only, I would suggest the line was commissioned'. That part of DW4's

evidence was reproduced in the judgment of the learned trial judge but, that notwithstanding, the learned judge agreed with DW4 that the PLS could not be commissioned. In our considered view, the respondent's refusal to commission the PLS was unreasonable and unjustified on the facts and in the circumstances of the case. The learned trial judge had, with respect, misdirected himself in fact and in law when there was credible evidence before him to conclude that the respondent, by its own actions and conduct, had unreasonably and without justification refused to commission the appellant's PLS.

[17] In the result, we allowed the appellant's appeal on the counterclaim and set aside the order of the learned judge on the judgment sum of RM872,950 awarded in favour of the respondent. We however affirm the decision of the learned trial judge in dismissing the appellant's appeal on the claim for the balance of purchase price of RM448,000. In our judgment the respondent was entitled to the retention sum held under cl 1(b) of the supplementary agreement as security for the due performance of the appellant's obligations and to the sum of RM44,050,000 in view of the numerous defects in the system which had put the respondent to a great expense and considerable inconvenience.

Appellant's appeal on counterclaim allowed but appeal on claim for balance of purchase price disallowed.

Reported by Kohila Nesan